No. 22233

United States
COURT OF APPEALS
for the Ninth Circuit

STATE OF OREGON, by and through its State Highway Commission, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson,

Appellant,

v.

Tug GO GETTER, et al including OLSON TOWBOAT CO., a California corporation,

Appellee.

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

BRIEF OF APPELLANT, STATE OF OREGON

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This is an appeal by plaintiff from an order of the District Court granting the motion of defendant, Olson Towboat Co. (hereafter, "Olson Towboat") to dissolve the Writ of Foreign Attachment placed upon defendant's tug VIRGINIA PHILLIPS as soon as she came into Oregon waters at Bandon, Oregon, on

October 14, 1966. The finality and severability of the order from the context of the collision litigation is such that it is appealable to this Court under 28 USC Section 1991; *Swift & Company Packers* v. *Compagnia Del Caribe*, (1950) 339 U.S. 684; *Cohen* v. *Beneficial Industrial Loan Corp.*, (1949) 337 U.S. 541. The District Court had admiralty jurisdiction, 28 USC Section 1333.

STATEMENT OF THE CASE

On October 13, 1966, the State of Oregon, acting by its State Highway Commission filed a libel in the District Court against Tug GO GETTER *in rem* and against several defendants *in personam*, including Oliver J. Olson & Co. and Olson Towboat (Tr. 1). As to the two mentioned defendants, the plaintiff alleged:

1. Oliver J. Olson & Co. was a California corporation with its principal place of business in San Mateo, California, and that it owned and operated barge J. WHITNEY.

2. Olson Towboat was a California corporation with its principal place of business in either San Francisco or San Mateo, California; that it owned and operated the ocean-going Tug JEAN NELSON, whose master Charles May was employed by Olson Towboat.

3. That at all relevant times defendant Olson Towboat was the *alter ego* of defendant Oliver J. Olson & Co.

4. That on October 4, 1966, defendant Oliver J. Olson & Co., through its *alter ego* and agent Olson Towboat brought the barge J. WHITNEY in tow of the JEAN NELSON into Bandon, Oregon. That Oliver J. Olson & Co. hired from Sause Bros. Ocean Towing Co. the Tug GO GETTER to tow the barge J. WHITNEY up the Coquille River and through plaintiff's bridge. That under direction of Oliver J. Olson & Co. Charles May, the master of the JEAN NELSON while in the employ of Olson Towboat, secured the barge to the Tug GO GETTER, placed a part of the crew of the JEAN NELSON aboard the barge J. WHITNEY and then himself on board the Tug GO GETTER which took the barge J. WHITNEY in tow to collide with plaintiff's bridge. That the overall command of the navigation of the flotilla, consisting of barge J. WHITNEY and Tug GO GETTER, was in the master of the JEAN NELSON if the overall command was not a joint command of Charles May and John G. Davis, master of Tug GO GETTER in the employ of Sause Bros. Ocean Towing Co.

5. After alleging various faults on part of Tug GO GETTER and all named defendants, plaintiff prayed, among other things, that in case defendants Oliver J. Olson & Co. and/or defendant Olson Towboat could not be found within the district, that all goods and chattels belonging to either or both of them, and in particular barge J. WHITNEY and a certain tug JEAN NELSON, now lying in the Coquille River, Oregon, may be attached by process of foreign attachment in the amount of $240,000.00, the sum sued for in the libel.

Upon affidavit of J. Robert Patterson, that defendants Oliver J. Olson & Co. and/or Olson Towboat could not be found within the district plaintiff had issued by the Clerk of the District Court Summons and Writ of Attachment (Tr. 12).

Upon instructions from plaintiff the U. S. Marshal served Olson Towboat by serving Summons and Writ of Foreign Attachment upon the Tug VIRGINIA PHILLIPS upon her entry into the Coquille River on October 14, 1966. Thereafter, on the same date Oliver J. Olson & Co. was summoned by personally serving its representative, Thomas Miller in Coos Bay, Oregon. Because Thomas Miller did not deny authority to receive process no property of Oliver J. Olson & Co. was attached (Tr. 12).

On April 17, 1966, defendant Olson Towboat entered its "restricted appearance" and moved the Court for an order dissolving the process of attachment and releasing Tug VIRGINIA PHILLIPS and the security substituted therefore from the process (Tr. 26). The motion was made upon the ground that Olson Towboat was doing business in Oregon and that it maintained an agent therein so that it could be found in Oregon. The motion also claimed that because plaintiff's libel alleged that Olson Towboat was the *alter* ego of Oliver J. Olson & Co. that plaintiff for that reason knew or should have known, that Olson Towboat was doing business in Oregon and was subject to process. The motion was based upon the affidavit of Oliver J. Olson, III and Thomas E. Miller.

In brief, Oliver J. Olson, III in his affidavit (Tr. 26) stated that he was a resident of Portland, Oregon, for about one and one-half years; that he was the representative and agent of Oliver J. Olson & Co., a California corporation engaged in the business of shipping lumber from Oregon and Washington ports to California and Hawaii ports; that Oliver J. Olson & Co. had offices in Portland and Coos Bay, Oregon; that it had two employees in its Portland office and one Thomas E. Miller employed in its Coos Bay office; that it had its name on its office doors and in the telephone directories in both Portland and Coos Bay, Oregon.

As to Olson Towboat the affidavit stated:

"8) That OLSON TOWBOAT CO. is a separate corporation from OLIVER J. OLSON & CO. I am not employed by it; that I was once an officer therein and generally I am familiar with the details of its operation.

"9) That OLSON TOWBOAT CO. is engaged in the business of operating tugboats, principally ocean-going tugs, and its principal customer is OLIVER J. OLSON & CO., but it has and will tow for other firms, persons or corporations, and OLIVER J. OLSON & CO. hires other tugs from other companies than OLSON TOWBOAT CO. whenever necessary; and that OLSON TOWBOAT CO. employs said THOMAS MILLER as its managing agent in the State of Oregon and maintains its Oregon office in Coos Bay in the OLIVER J. OLSON & CO. office and is doing business in Coos County, State of Oregon and has for more than five years, and maintains an

account with the State Compensation Department of the State of Oregon (see Exhibit 'A' attached) and files Information Returns with the Tax Commission of the State of Oregon (see Exhibit 'B' attached).

"10) That I know that the said THOMAS MILLER is the managing agent for, and receives part of his salary from OLSON TOWBOAT CO., and I know generally that his duties are transacting whatever shoreside business is necessary in the Coos Bay area for the business of OLSON TOWBOAT CO., such as ordering fuel, repairs, replacements for its tugs and crews, taking applications for employment, dispatching its tugs, and any other necessary business.

"11) That I also know that said THOMAS MILLER resides in North Bend, Oregon, just outside of Coos Bay and he is well known as the managing agent for OLSON TOWBOAT CO., and has resided in this area for more than fifteen years; and I believe OLSON TOWBOAT CO. is well-known in the Coos Bay, Newport, Bandon and Astoria, Oregon, areas."

The Exhibit A referred to in the Olson affidavit (Tr. 26) is a letter dated March 20, 1967, to Olson Towboat's Portland, Oregon, attorney reporting that Olson Towboat had secured coverage with the State Industrial Accident Commission on May 22, 1961, and had only one salesman working in Oregon. Exhibit B is letter dated March 31, 1967, to the same attorney from Oregon State Tax Commission reporting that Olson Towboat is not registered in the files

of the Withholding Department of the Tax Commission, but that it is filing information returns with the Audit Department.

The affidavit of Thomas E. Miller (Tr. 26) stated in brief that he was employed by both Oliver J. Olson & Co. and Olson Towboat with office in Coos Bay; that he was the local representative for Oliver J. Olson & Co. and in addition, the managing agent for Olson Towboat, handling all of the shoreside business in the State of Oregon for Olson Towboat "as the case may arise." He then stated:

> "That the process in the within action was served on me on October 14, 1966, at about 5:15 p.m. as the agent of Oliver J. Olson & Co. Prior to that and about 2:45 p.m. service was made on Olson Towboat Co. by attaching the tug VIRGINIA PHILLIPS by leaving copies of the process with the Captain of the VIRGINIA PHILLIPS, a tug which is owned by Olson Towboat Co. That prior to the service on the Captain of the tug and its seizure, no inquiry was made of me as to whether or not I was the Managing Agent of Olson Towboat Co. I have been served before on behalf of Oliver J. Olson & Co. on a number of occasions."

> "That inasmuch as I handle all of the business for the towboat company in the Coos Bay area as well as in Bandon and in Newport and occasionally in Astoria, I believe that if anyone had inquired on the waterfront, particularly among any of the ship supply houses, oil docks, or other tugboat companies, he would have been advised that I am the Managing Agent for Olson Towboat Co. in this state."

In opposition to the motion to dissolve the Writ of Foreign Attachment the plaintiff filed on May 9, 1967, the affidavit of George E. Rohde, Chief Counsel for the State Highway Commission which stated as follows (Tr. 37):

> "I am Chief Counsel for the Oregon State Highway Commission. Shortly after the Bullard Bridge at Bandon, Oregon, was struck and damaged on October 4, 1966, by barge J. WHITNEY being towed up the Coquille River by Tug GO-GETTER the State Highway Department undertook to investigate the collision.
>
> "First reports were that Oliver J. Olson & Co. owned the barge J. WHITNEY and that Sause Bros. Ocean Towing Co. owned the Tug GO-GETTER. In our investigation I learned that the master of the Tug JEAN NELSON was aboard the Tug GO-GETTER possibly operating her at the time of the collision."
>
> "On October 10, 1966, I wrote and mailed the demand letter as set forth in Exhibit A to this affidavit addressed to both Oliver J. Olson & Co. at Coos Bay, Oregon, and Sause Bros. Ocean Towing Co. also at Coos Bay, Oregon."
>
> "Shortly after mailing of the letter of October 10, 1966, I received a telephone call from Attorney Samuel L. Holmes of San Francisco, California, who told me he represented Oliver J. Olson & Co. In the course of the conversation I mentioned the report that I had received to the effect that the master of the JEAN NELSON was aboard the Tug GO-GETTER. Mr. Holmes explained to me that the master of the JEAN

NELSON was employed by the Olson Towboat Company which operated the JEAN NELSON in towing the barge J. WHITNEY on the coast and that Olson Towboat Co. was a separate and distinct company from Oliver J. Olson & Co. Mr. Holmes also mentioned that Oliver J. Olson & Co. owned the barge J. WHITNEY."

"On the afternoon of October 11, 1966, I and Mr. J. Robert Patterson of our office consulted William F. White of the Firm of White, Sutherland & Gilbertson at Portland, Oregon, in regard to action to be taken. The present action was filed in the late afternoon of October 13, 1966, and the Tug VIRGINIA PHILLIPS arrested in the late evening of October 14, 1966."

"The first knowledge I had of Olson Towboat Co. being involved was in my telephone conversation with Mr. Holmes before we had consulted Mr. White."

"I checked the office of the Commissioner of Corporation to determine if either Oliver J. Olson & Co. or Olson Towboat Co. had qualified to do business in Oregon or had appointed an agent in the State of Oregon to receive process. I found that neither corporation was qualified to do business or had appointed an agent in this state to receive process. I knew Oliver J. Olson & Co. had an office in Coos Bay, Oregon, and that Mr. Tom Miller represented that company. A check in the telephone directories of Portland and Coos Bay showed Oliver J. Olson & Co. as being listed but not Olson Towboat Co. I was unable to find either an office or agent of Olson Towboat Co. in the State of Oregon."

"In the course of preparing the action which was filed October 13, 1966, it was learned from the U. S. Collector of Customs in San Francisco that the barge J. WHITNEY was not owned by Oliver J. Olson & Co. as Mr. Holmes had represented but rather by 12 or 13 individuals whose names appeared to be members of the Olson family."

"On October 13, 1966, at the time of filing the herein action, I had no knowledge of Olson Towboat Co. doing business in Oregon or having any agent qualified to receive process in Oregon. My search and search of others did not find Olson Towboat Co. in the State of Oregon. I firmly believed it was a California corporation operating tugs on the Pacific Coast and coming fleetingly, if at all, into Oregon ports.' '

"Upon the recommendation and advice of William F. White, whom the plaintiff employed as an attorney experienced in admiralty matters, the United States Marshal was instructed to arrest the JEAN NELSON and/or VIRGINIA PHILLIPS upon either or both of their arrivals in an Oregon port, and then serve Oliver J. Olson & Co., the other defendant, by personally serving Tom Miller. Plaintiff did not know the extent of authority of Tom Miller as to receiving process for Oliver J. Olson & Co. and as a consequence the Marshal was instructed that if he denied authority to receive process to then attach whatever property that could be found of Oliver J. Olson & Co. which was thought possibly to be lumber dockside. It developed that the JEAN NELSON did not come into an Oregon port on the night of October 13, 1966, but only

the VIRGINIA PHILLIPS. I was fearful that if Oliver J. Olson & Co. were served first that it would report the action to Olson Towboat Co. which would keep its tugs out of Oregon waters and not appear in the action."

"On October 13, 1966, the approximate damage to the Bullard Bridge appeared to be $240,000.00. So far as I knew Olson Towboat Co. could not be reached in the State of Oregon except through the arrest of its vessels in Oregon, and having learned through Mr. Holmes that Olson Towboat Co. was a separate entity and operation from Oliver J. Olson & Co. I regarded it prudent to reach its vessel in Oregon waters to secure unequivocal jurisdiction over Olson Towboat Co. while it was possible to do so."

Defendant Olson Towboat thereafter filed on May 15, 1967, a counter-affidavit of San Francisco Attorney, Samuel L. Holmes (Tr. 42). In brief, Mr. Holmes stated that when Oliver J. Olson & Co. received plaintiff's demand letter (Exhibit A to Rohde Affidavit) he telephoned Mr. Rohde and, among other things, explained that Oliver J. Olson & Co. and Olson Towboat were separate and distinct corporations; that Captain May was the master of the JEAN NELSON and that while he had heard that Captain May was aboard the tug GO GETTER he was not there as either an employee of Oliver J. Olson & Co. or Olson Towboat. He did not state that he told Mr. Rohde that the man who acted as agent for Oliver J. Olson & Co. in Coos Bay was also agent for Olson Towboat, but did state that had Mr. Rohde

made known the fact that he wished to have process served on Olson Towboat he would have told him that process could have been served upon the same man for both companies. Attached to the affidavit is Mr. Holmes' letter of October 12, 1966, to Mr. Rohde explaining that Oliver J. Olson & Co. and Olson Towboat were separate corporations and why neither corporation was involved in or liable for the collision with plaintiff's bridge.

Following the hearing based on the foregoing pleadings and affidavits the District Court on June 27, 1967, granted the motion of Olson Towboat and ordered process against tug VIRGINIA PHILLIPS dissolved (Tr. 50). This appeal is from that order.

SPECIFICATION OF ERROR

This appeal is from the order of the District Court granting a motion of Olson Towboat to dissolve the writ of foreign attachment. Because the District Court neither rendered an opinion nor made findings of fact Appellant was required to designate as points on appeal that the District Court both abused its discretion and erred in law (Tr. 55).

The posture of this case on appeal is like that in *Horizons Titanium Corporation* v. *Norton Company* (1 Cir., 1961) 290 F.2d 421, 424 which involved an appeal from an order denying motion to quash a subpoenas duces tecum. Here, as there, this Court for lack of findings cannot tell whether it is reviewing

an exercise of discretion or a ruling of law. However, here, as there, we believe this Court can find nothing in the record to support the order. With basic facts undisputed the error of the District Court will appear to be one of law in misconceiving or misapplying the "not found" rule which is essential to determining a motion to dissolve a writ of foreign attachment.

SUMMARY OF ARGUMENT

In ordering the writ dissolved the District Court misconceived or misapplied the standard of the "not found" rule to undisputed facts. The affidavit record fails to support a finding required by the rule that Olson Towboat was in the jurisdictional sense present in Oregon and that plaintiff had not used due diligence in its endeavor to find Olson Towboat in Oregon and to discover that Tom Miller, who was held out as an Oliver J. Olson & Co. agent was also an Olson Towboat agent.

When, as here, a California corporation did not qualify to do business in Oregon or appoint an agent to receive process it should not be permitted, for purpose of dissolving a writ of foreign attachment, to establish its corporate presence by anything less than proof of a substantial and systematic course of actual business activity. Such proof, if existing, is so obviously within its ability to produce that it should not suffice for Olson Towboat merely to prove it had a sole agent in Oregon who transacted "whatever shore-

side business is necessary." This should be particularly true of Olson Towboat which is in the business of operating ocean-going tugs on the Pacific Coast and fails to even mention how many tugs it operates or how frequently, if at all, they enter Oregon waters.

For a collision case such as this plaintiffs fulfilled their due diligence obligation when they looked and could not find Olson Towboat having appointed an agent to receive process and could not find it listed in any telephone directory unlike Oliver J. Olson & Co., a separate but commonly owned corporation. What is unusual in this case is that prior to the levying of the writ a San Francisco attorney representing Oliver J. Olson & Co. telephoned and wrote plaintiff from San Francisco to state that Olson Towboat was a separate and distinct company from Oliver J. Olson & Co. without disclosing that a Tom Miller represented both companies (Tr. 37, 42). Such conduct would make it clearly erroneous for any court to find plaintiffs to be lacking in due diligence in not discovering that Tom Miller, known as an Oliver J. Olson & Co. agent was also an Olson Towboat agent.

Unless reversed, the order of the District Court will have far-reaching consequences in nullifying and rendering too precarious for use the ancient writ of foreign attachment which has long been regarded as a necessary adjunct to the admiralty practice.

ARGUMENT

The writ of foreign attachment

Admiralty has long used the writ of foreign attachment of a person's goods in order to compel personal appearance, *Puget Sound Tug & Barge Co.* v. *The GO GETTER*, (Ore. 1952) 106 F. Supp. 492. The process is of ancient origin, *Atkins* v. *The Disintergrating Co.*, (1872) 85 U.S. (14 Wall.) 272 and is not dependent upon state law, *Bjolstad* v. *Pac. Coast S. S. Co.*, (N.D. Calif., 1914) 221 F. 692. Authority for the use of the writ stems from Admiralty Rule 2, (28 USCA, Adm. R. 2). Although Rule B(1) of the Federal Rules of Civil Procedure (28 USCA R. B(1) has supplanted Admiralty Rule 2 nothing has been changed so far as this case is concerned.

The writ of foreign attachment has as its dual purpose: (1) to obtain jurisdiction of the defendant *in personam* through his property, and (2) to assure satisfaction of any decree in plaintiff's favor, *Swift & Company Packers* v. *Compania Del Carib*, (1950) 339 U.S. 684. While neither purpose can be separated from the other both are of equal importance. In fact, courts on occasion have emphasized the importance of the writ's security purpose, *Swift & Company Packers* v. *Compania Del Carib*, (1950), supra; *Asiatic Petroleum Corp.* v. *Italia Societa Anonema Di Navigazione*, (3 Cir., 1941) 119 F.2d 610. Because these dual purposes cannot be separated it has been held that personal appearance prior to the

levying of a writ will defeat it, *Melmay* (*Attachment*) (Canal Zone, 1932) 1933 A.M.C. 1057, while an appearance immediately afterwards will not. *Swift & Company Packers* v. *Compania Del Carib*, supra.

The Writ's "not found" Rule

Let us first define what we will term the "not found" rule. A lucid expression of the rule was given by District Judge Weinfeld in *United States* v. *Cia. Naviera Continental S. A.*, (S.D. N.Y., 1959) 178 F. Supp. 561. After pointing out that Admiralty Rule 2 permits utilization of the writ only when a respondent is not found within the jurisdiction Judge Weinfield at page 563 stated:

> "The Rule does not define 'found.' The term has a different significance depending upon whether the respondent is a resident or nonresident. In the case of a foreign respondent, such as we deal with here, whether or not it can be found within the district presents a two-pronged inquiry: first, whether it can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process.
>
> "The first inquiry is directed to whether or not the respondent is present within the district by reason of activities on its behalf by authorized agents so as to subject it to this Court's jurisdiction in in personam proceedings.[5] If not, then

"[5] See International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95; Szabo v. Smed-

the respondent cannot be found within the district and this ground alone would be sufficient to support the attachment.[6]

"On the other hand, even if the foreign respondent be found within the district in a jurisdictional sense, its property is not immunized from attachment. The second question, (the only one arising in the instance of a resident respondent), then presents itself. Could the respondent be found within the district with due diligence for service in the libel proceeding? . . ."

Olson Towboat failed to show any substantial systematic business activity sufficient to finding that it could be "found" in Oregon.

As we have seen, the first of the two-pronged factual inquiry on the part of the District Court was whether or not Olson Towboat showed that it had done business in a substantial and systematic manner sufficient to be jurisdictionally found in Oregon. *International Shoe Co.* v. *Washington*, (1945) 326 U.S. 310, 316. This it failed to do.

If the Olson and Miller affidavits are stripped of their self-serving conclusions and their "hearsay"

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vig Tankrederi, A. S., D.C.S.D.N.Y., 1951, 95 E. Supp. 519; Federazione Italiana Dei Consorzi Agrari v. Mandask Compania D.V., D.C.S.D.N.Y. 1957, 158 F. Supp. 107."

"[6] It is for this reason that we find reported cases in which respondents in attachment proceedings argue in reverse of the contention usually made when resisting jurisdiction. See comment by Judge Bryan in Federazione Italiana Dei Consorzi Agrari v. Mandask Compania D.V., D.C.S.D.N.Y., 1957, 158 F. Supp. 107, 111."

conjecture* all they prove is that Olson Towboat shared the services of the Oliver J. Olson & Co. representative at Coos Bay to transact for Olson Towboat "whatever shoreside business is necessary."

It seems to us that when a California corporation neither qualifies to do business in Oregon nor appoints an agent to receive process it should be required to do more than leave to conjecture the substantiality and consistency of the business actually conducted by its single agent, who turns out to be also employed by another company. This is particularly true of Olson Towboat which operates ocean-going tugs on the Pacific Coast and professes to be separate and distinct from its commonly owned corporate customer having a similar name.

Conspicuously absent from the Olson Towboat proof is the number of tugs it operates and the frequency, if at all, they come into Oregon waters. All that appears of record is that its tug JEAN NELSON was long enough in Bandon on October 4 for her master to navigate the tug of a stranger up the

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* For example in the Olson affidavit it is stated: "he (Thomas Miller) is well known as the managing agent for OLSON TOWBOAT CO. . . . and I believe OLSON TOWBOAT CO. is well known in the Coos Bay, Newport, Bandon and Astoria, Oregon areas" while in the Miller affidavit it is stated: ". . . I believe that if anyone had inquired on the waterfront, particularly among any of the ship supply houses, oil docks, or other tugboat companies, he would have been advised that I am the Managing Agent for Olson Towboat Co. in this state." In the Holmes' affidavit it is stated: "Had Mr. Rohde made known the fact that he wished to have process served upon Olson Towboat Co., he would have been advised that process could be served on the same man for both companies."

Coquille River to collide with plaintiff's bridge and that its tug VIRGINIA PHILLIPS arrived on October 14, 1966, to be attached. Nor is there any word in the record about Olson Towboat soliciting any business, maintaining any bank accounts, paying any taxes or in fact doing any business at all in Oregon.

Ordinarily a corporation doing business in a state holds a person out in some manner as its agent for the transaction of business. Not so here. Olson Towboat was content to let Tom Miller be held out as the representative of Oliver J. Olson & Co. without doing a single thing to cause anyone to identify him as an Olson Towboat agent. While professing that Olson Towboat was separate and distinct from Oliver J. Olson & Co. it was content to let Tom Miller work out of an office bearing the name of Oliver J. Olson & Co. and having its name listed in the telephone directory without any mention whatsoever of Olson Towboat. A corporation which permits the identity of its only agent to become so camouflaged cannot in fairness come into court and claim a corporate presence short of showing exactly the substance and continuity of business transacted by such agent. The record cannot support a finding that the business of Olson Towboat in Oregon was so significant that it could have been found in the jurisdictional sense. See: *American Potato Corp.* v. *Boca Grande S. S. Co.* (E.D. Pa., 1916) 233 F. 543 and *Seawind Compania S. A.* v. *Crescent Line* (2 Cir., 1963) 320 F.2d 580.

A finding that plaintiff lacked due diligence in not dicovering that the Oliver J. Olson & Co. agent was also an Olson Towboat agent would be clearly erroneous.

It was clearly erroneous for the District Court to have dissolved the writ where to do so it was required to at least find that plaintiff had not used due diligence to discover that the Oliver J. Olson & Co. agent was also an Olson Towboat agent qualified to receive process.

On this second of the two-pronged inquiry the undisputed facts should be viewed from the position of plaintiff and what it knew, or did not know, or could be reasonably charged with finding out. George E. Rohde, Chief Counsel for the Oregon State Highway Commission had to decide for plaintiff whether or not to attach the VIRGINIA PHILLIPS upon her entry into Oregon waters. We have set forth in the Statement of the Case his affidavit giving his reasons for the writ and we will not repeat it here.

First, however, is the question of whether the criteria for measuring the plaintiff's conduct is one of "due diligence" or one of "bad faith." While the Court in *United States* v. *Cia Naviera Continental S. A.*, (S.D. N.Y., 1959) 178 F. Supp. 561 speaks of "due diligence" the same Court in *Cocotas Steamship Co.* v. *Sociedad Maritime Victoria,* (S.D. N.Y., 1956) 146 F. Supp. 540, 542 held that nothing short of bad faith—improper practice or a manifest want of equity—would be sufficient to warrant the dissolution of a writ of foreign attachment. There must

be some difference between "lack of due diligence" and "bad faith" as the courts have also held that an order dissolving a writ does not in itself entitle the defendant to damages for wrongful attachment in absence of a showing of bad faith, *Applewhaite* v. *SS SUNPRINCESS*, (N.J., 1956) 136 F. Supp. 769; *Walsh Transportation Co.* v. *Iroquois Transit Corp.*, (S.D. N.Y., 1926) 16 F.2d 475; *Artenaho* v. *W. R. Grace & Co.*, (E.D. Va., 1923) 286 F. 762. The difference is important in this case as the first act of Olson Towboat in appearing in this action was to counterclaim against plaintiff to recover $15,000.00 as damages for alleged wrongful attachment. If "bad faith" is the standard for dissolving this writ the District Court should be quickly reversed because Olson Towboat never claimed and the record does not support a finding of "bad faith" on the part of plaintiff. By the same token, if such was or could have been an issue here and the order below is not reversed, then plaintiff might on basis of collateral estoppel find itself deprived of this important defense on the wrongful attachment counterclaim without really ever having had its day in court.

We firmly believe that the criteria on motion to dissolve a writ is or should be "bad faith" and not mere lack of "due diligence" if the valuable maritime remedy of foreign attachment is not to be made so precarious to use as to become discarded as a remedy by prudent and responsible litigants. However, we will argue this case on plaintiff's lack of due diligence; a less formidable hurdle for Olson Towboat

to overcome. Lack of due diligence was the only issue raised in the Court below and one which the record cannot reasonably support.

Shortly after the collision of October 4, 1966, plaintiff's investigation revealed that it was the barge of Oliver J. Olson & Co. which struck the bridge. Plaintiff found the Oliver J. Olson & Co. office in Coos Bay and learned that Tom Miller was its representative. Plaintiff, by letter of October 10, made demand upon Oliver J. Olson & Co. at its Coos Bay office (Ex. A to Rohde aff.). At this time it began to appear that the master of the tug JEAN NELSON was navigating the tug GO GETTER at time of collision. Olson Towboat had never been heard of. How well Olson Towboat was concealed in the woodwork of Oliver J. Olson & Co. at Coos Bay can be gleaned from the loud silence of Tom Miller in his affidavit when he stated that he had been served process before as a representative of Oliver J. Olson & Co. "on a number of occasions" but failed to mention he had ever been served process as an agent for Olson Towboat.

The next and most significant occurrence in this case is that George E. Rohde in Salem, Oregon, in response to his letter of October 10 to Oliver J. Olson & Co. at Coos Bay received a long distance telephone call from attorney Samuel L. Holmes in San Francisco. In that telephone conversation when Mr. Rohde mentioned that his investigation indicated that the master of the JEAN NELSON was aboard the tug

GO GETTER at time of the collision, Mr. Holmes stated that the master of the JEAN NELSON was employed by Olson Towboat which operated on the coast and that Olson Towboat was a separate and distinct company from Oliver J. Olson & Co. which owned the barge J WHITNEY. He also added that if Captain Charles May was aboard the GO GETTER he was there only as a passenger.

The San Francisco to Salem telephone conversation was followed up by a letter from attorney Holmes dated October 12 (Ex. A, Holmes aff.) wherein (presumably on behalf of both Oliver J. Olson & Co. and Olson Towboat) Mr. Holmes again reiterated that Olson Towboat was separate and distinct from Oliver J. Olson & Co. with neither corporation having an interest in the other. The letter then went on to state that neither Oliver J. Olson & Co. nor Olson Towboat were involved in or responsible for the collision.

It was the telephone call and letter from San Francisco which gave plaintiff for the first time knowledge of the existence and involvement of Olson Towboat. In the meantime, George E. Rohde, by investigation found: (1) Neither Olson Towboat nor Oliver J. Olson & Co. were qualified to do business in Oregon or had appointed an agent to receive process; (2) that while Oliver J. Olson & Co. had offices in Portland and Coos Bay with its name appearing in the telephone directory of both cities that Olson Towboat did not; (3) that the master of the JEAN

NELSON was navigating the GO GETTER and was not merely a passenger as claimed by Mr. Holmes; (4) that the barge J WHITNEY was owned by 12 or 13 individuals who appeared by name to be members of the Olson family and not by Oliver J. Olson & Co. as had been represented; and (5) that both of these California corporations through a San Francisco attorney were denying involvement in and responsibility for the bridge damage estimated at $240,000.00.

With this knowledge and investigation in hand, plaintiff, through George E. Rohde, employed an admiralty attorney and upon the latter's advice filed the libel in the District Court and caused the VIRGINIA PHILLIPS to be attached upon her entry into Oregon waters.

At the outset, the case at bar is unlike *United States* v. *Cia Naviera Continental S. A.*, (S.D. N.Y., 1959) 178 F. Supp. 561 as in this case it does not appear that plaintiff had prior business dealings with Oliver J. Olson & Co. as an agent for Olson Towboat or knew that Oliver J. Olson & Co. husbanded the Olson Towboat tugs and otherwise acted as its business agent in Oregon. Nor is the case at bar like *Federazione Italiana D.C.A.* v. *Mandask Compania D. V.*, (S.D. N.Y., 1957) 158 F. Supp. 107 where the plaintiff attached credits of a defendant in a New York bank, knowing that an officer of defendant could be found in his office in New York, but not telling the U. S. Marshal to serve him there. Nor

is this case like a number of other cases which have arisen in New York as result of a maritime business transaction where a plaintiff would go from one district of New York into another in order not to find the defendant present so that his bank funds could be garnished.

Due diligence can mean nothing more than acting as a reasonable man would act under like circumstances. Plaintiff made normal inquiry of sources where one normally looks to find out whether or not a foreign corporation has an agent in the state to receive process. Had Olson Towboat so much as had its name on the door of the Coos Bay office or conducted its business in any cognizable manner plaintiff, in making its reasonable search, would have found it as it did Oliver J. Olson & Co.

In this case the District Court misconceived the criteria of due diligence by applying too strict a concept as it must have concluded that plaintiff did wrong in not asking the Oliver J. Olson & Co. representative if he also represented Olson Towboat. No reasonable person in the position of plaintiff would have done such a thing if he gave any thought to the probable consequences. It could reasonably be expected that had inquiry been made of the Oliver J. Olson & Co. representative, that a negative or evasive answer would be given while word was being passed to Olson Towboat so its VIRGINIA PHILLIPS could either be diverted or permitted to scamper out of Oregon waters. In such eventuality plaintiff would

have found itself without jurisdiction over Olson Towboat in an action which required its presence. Plaintiff had to lay this most unusual collision case in Oregon if it was to secure *in rem* jurisdiction over the GO GETTER and *in personam* jurisdiction over the Oregon defendants.

A page could be borrowed from the *Melmay* (*Attachment*) (C. Z., 1932) 1933 A.M.C. 1057. In that case various plaintiffs were seeking to attach the MELMAY upon her passage through the Panama Canal and an enterprising defendant was seeking to appear voluntarily in the proceedings before attachment in order to defeat attachment. The Court in discussing this practice observed:

> ". . . But inasmuch as the right to attach property will be lost immediately by the respondents appearance, the marshal should not, by devoting time to a fruitless search for the respondent, lose the opportunity of attaching his property.
>
> * * * * *
>
> ". . . But, in a proper case, a libelant enjoys the right of foreign attachment and that right should not be lightly destroyed if it was legally exercised."

While plaintiff's main concern was to secure unequivocal *in personam* jurisdiction over Olson Towboat while it could do so, it was also to obtain security for its expected $240,000.00 decree for bridge damage. Security is as equally a legitimate purpose of the writ as is the purpose of insuring the defend-

ant's appearance. *Swift & Company Packers* v. *Compania Del Carib*, (1950) 339 U.S. 684.

Perhaps the clearest error of the District Court was its unwillingness to evaluate or apply to the measuring of plaintiff's due diligence the undisputed fact that the Olson corporations through their San Francisco attorney had represented Olson Towboat to be a separate and distinct company from Oliver J. Olson & Co. without also disclosing the fact that the Oliver J. Olson & Co employee at Coos Bay was also the agent for Olson Towboat. As innocently as this misrepresentation might have been conceived it had the effect of not only causing plaintiff to become suspicious of the true relationship of these two corporations, but, more important here, to abandon any thought that Tom Miller, known as an Oliver J. Olson & Co. employee could possibly be an agent of Olson Towboat.

A word about *alter ego*: In its motion Olson Towboat claimed that because plaintiff had alleged in its libel that Olson Towboat was the *alter ego* (and agent) of Oliver J. Olson & Co. that plaintiff should have known that Tom Miller, who was wearing an Oliver J. Olson & Co. hat also had in his pocket an Olson Towboat cap. The *non sequitur* aspect of this claim lies in the fact that the allegation at most suggests that plaintiff had knowledge that Oliver J. Olson & Co. was the corporate agent of Olson Towboat and not Tom Miller who later showed up as the agent. Furthermore, the allegation claimed Olson

Towboat the *alter ego* (and agent) of Oliver J. Olson & Co. and not vice versa. The allegation was obviously set forth in the libel so that at time of trial plaintiff might be able to prove, if it could, that Oliver J. Olson & Co. along with Olson Towboat was the employer responsible for the conduct of Captain May while navigating the GO GETTER.

It is also important to appreciate that only the allegation and not an established fact was claimed by Olson Towboat to conclusively bind plaintiff with knowledge it did not have and which was contrary to what had been represented prior to the attachment. The allegation was in no sense an admission against interest as would have been the case had Olson Towboat conceded or represented its *alter ego* relationship with Oliver J. Olson & Co. instead of denying it. In *Swift & Co. Packers* v. *Compagnia Del Carib*, (1950) 339 U.S. 684 the Supreme Court reversed an order vacating a writ because the libelant had alleged that the corporation which owned the vessel under attachment was the *alter ego* of the corporation which owed the maritime obligation and libelant had not been given an opportunity to prove its allegation which was essential to sustaining validity of the writ. Here, it was essential for Olson Towboat to prove that plaintiff knew or should have known that Tom Miller was an Olson Towboat agent prior to the attachment in order to defeat the writ. The allegation in plaintiff's libel even if it was in point could not fairly establish that fact.

We have found no case in the books like the one at bar. The situation here is comparable to the one where a party to litigation invites the trial judge to commit error and then complains of the error on appeal.

Reversal of the District Court is not only important to permit the plaintiff to retain the security it rightfully obtained in the attachment of the VIRGINIA PHILLIPS and to make unnecessary it defending a wrongfully brought, wrongful attachment counterclaim, but to also preserve for admiralty the writ of foreign attachment as a practical and useful remedy. This ancient writ will become too precarious for use by any responsible litigant if the requirement of due diligence must include inquiries which give vessel owners warning to keep their vessels out of the jurisdiction or permits defendants to conceal their agents as employees of other corporations and then to bring them out into the open after attachment for the purpose of dissolving the writ.

CONCLUSION

Irrespective of whether the District Court erred in reaching unexpressed conclusions of fact or unexpressed conclusions of law it was clearly erroneous in dissolving the writ of foreign attachment. The affidavit record in this case cannot support any finding that Olson Towboat was present in Oregon in the jurisdictional sense or that plaintiff lacked due dili-

gence in not discovering that the Oliver J. Olson & Co. representative in Coos Bay was also the agent of Olson Towboat qualified to receive process.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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